PTO Form 1960 (Rev 10/2011)
OMB No. 0651-0050 (Exp 07/31/2017)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85892354
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION	
MARK	http://tmng-al.uspto.gov/resting2/api/img/85892354/large
LITERAL ELEMENT	DISTINCT
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	

Request for Reconsideration Pending Appeal Trademark Application No. 85892354 ? DISTINCT Applicant has amended it?s class 9 goods downloadable software in the nature of a mobile application not for general business purposes that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content, excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics. Applicant has deleted its Class 35 Services and as such contends that its mark is not confusingly similar to the marks reflected in Registration Nos. 3800251 and 3935604. The Examiner has refused registration of Applicant?s mark on the grounds that it is confusingly similar to, Registration Nos. 162990, DISTINCT for computer software for personal computers and work stations in the field of general business. Applicant disagrees with the Examiner that the marks are confusingly similar to the above referenced registered marks and argues as follows. CONFUSION MUST BE PROBABLE, NOT POSSIBLE For confusion to be likely the confusion must be probable; it is irrelevant that confusion is merely possible. Electronic Data Sys. Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1465 (TTAB 1992) (standard is likelihood of confusion, ?not some theoretical possibility built on a series of imagined horrors?); Rodeo Collection, Ltd. v. West Seventh, USPQ2d 1204, 1206 (9th Cir. 1987) (?probable, not simply a possibility?). Trademark law is ?not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.? Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 21 USPQ2d 1388 (Fed Cir. 1992), quoting Witco Chem. Co. v. Whitfield Chem. Co., 164 USPQ 43, 44-45 (CCPA 1969), aff?g., 153 USPQ 412 (TTAB 1967). For the reasons outlined below, Applicant respectfully argues that confusion is not probable in this instance. APPLICANT?S MARK IS NOT CONFUSINGLY SIMILAR TO THE REGISTERED MARKS (a) The Likelihood Of Confusion Analysis, Generally Section 2(d) of the Trademark Act provides, in relevant part: [n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ? [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive?. 15 U.S.C. ? 1052(d) (emphasis added). As used in Section 2(d), ?likelihood? of confusion is synonymous with ?probable? confusion; it is insufficient if confusion is merely ?possible.? 3 McCarthy on Trademarks ? 23:3, p. 23-14 (citing American Steel Foundries v. Robertson, 269 U.S. 372 (1926)). Moreover, the question of likelihood of consumer confusion is one of fact. See In re E.I. DuPont de Nemours and Co., 476 F.2d 1357, 1361, 177 USPQ 563 (C.C.P.A. 1973). Therefore, each case must be decided on its own facts, and there can be ?no litmus rule which can provide a ready guide to all cases.? Id. at 1361. In testing for likelihood of confusion under Section 2(d), the DuPont court set forth thirteen factors to be considered. Id. at 1361. However, pursuant to TMEP ? 1207.01, only the first two factors are to be considered unless relevant evidence with respect to the remaining factors is contained in the record. The first two DuPont factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; and (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use. THE GOODS ARE DISTINCTLY DIFFERENT Marks do not exist in an abstract world; rather, the issue of likelihood of confusion must be determined in relation to specific goods and/or services. It is not enough for the Examining Attorney to say that the marks are highly similar. The analysis requires a deeper investigation into the goods associated with the marks. In Class 9, Applicant?s Mark covers ?downloadable software in the nature of a mobile application that allows users to interact online with

information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content.? In Class 9, the registered mark covers ?computer software for personal computers and workstations in the field of general business? (Reg. No. 1629906 , DISTINCT). the computer software for personal computers and business work stations covered by the Registered mark is significantly different from the ?social? mobile ?app? covered by Applicant?s Mark. According to the website of the mark owner, Distinct Corp. (previously made of record in this matter) it publishes software products for software developers and network administrators. Applicant?s mobile ?app? is for the general public for general, recreational use and (as specifically designated by Applicant?s amended description of goods) not for general business purposes.. Applicant?s mobile app and Distinct Corp.?s professional software programs are not related because they both involve computing. Rather than semantic generalization of the services, it is consumer perception that is significant for determining relatedness. See, e.g., Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1463 (TTAB 1992) (?[T]he issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category?); UMC Industries, Inc. v. UMC Electronics Co., 207 USPQ 861, 879 (TTAB 1980) (?the fact that one term, such as ?electronic,? may be found which generally describes the goods of both parties is manifestly insufficient to establish that the goods are related in any meaningful way?); Harvey Hubbell, Inc. v. Tokyo Seimitsu Co., 188 USPQ 517, 520 (TTAB 1975) (?In determining whether products are identical or similar, the inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties?). The fact that products or services can be categorized in the same broad "field" does not, in and of itself, provide a basis for regarding the products or services as "related." In re Digirad Corp., 45 USPQ2d 1841 (1998) (holding that despite some industry "overlap," DIGIRAY and DIGIRAD are not confusingly similar for high tech medical diagnostic equipment used for different purposes). See also, Cooper Industries Inc. v. Repcoparts USA, Inc., 218 USPQ. 81, 84 (TTAB. 1983) ("the mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required 'relatedness'"). The Goods Are Marketed to Sophisticated Consumers Where the relevant buyer class is composed solely of professional or commercial purchasers, it is reasonable to set a higher standard for likelihood of confusion than exists for general consumers. Many cases state that where the relevant buyer class is composed of professionals familiar with the field, they are sophisticated enough not to be confused by trademarks that are closely similar. (See, Arrow Fastener Co. v. Stanley Works, (2d Cir. 1995) 59 F.3d 384, (knowledgeable buyer of defendant?s $400 pneumatic stapler gun used for building construction and furniture manufacture is sophisticated and not likely to be confused by defendant?s model number); CMM Cable Rep. v. Ocean Coast Props., Inc., (D. Me. 1995) 888 F.Supp. 192, (sophisticated professional buyers ?are less likely to be confused as to the source or origin of a product than ordinary consumers of inexpensive foods or services.?).) This is the case even where identical marks are associated with related goods. (Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., (1st Cir. 1983) 220 USPQ 786 (ASTRA for anesthetic preparations and for computerized blood analyzers)). Here Distinct Corp?s goods are used for software developers and network administrators. These are professional purchasers who will engage in selection process more discerning than an ordinary purchaser. Applicant?s mobile app is used for social and entertainment purposes and not for business purposes. As such, it is used by an entirely different class of consumers. Applicant contends there is little to no overlap between the groups of consumers and if there is overlap, the purchasers of the Distinct Corp?s goods are professionals and will be much more discerning and careful such that confusion is not probable. DOUBTS MUST BE RESOLVED IN APPLICANT?S FAVOR For the reasons outlined above, Applicant has raised clear doubts on the issue of whether Applicant's mark is confusingly similar to the registered marks. The law is clear that such doubts ?should be resolved in Applicant?s behalf....? In re Aid Laboratories Inc., 221 USPQ 1215, 1216 (TTAB 1993) (PEST PRUF not merely descriptive for animal shampoo with insecticide); In re American Hospital Supply Corp., 219 USPQ 949 (TTAB 1983); In re Gourmet Bakers. Inc., 173 USPQ 565 (TTAB 1972). See also In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981); and In re Grand Metropolitan Foodservice Inc., 30 USPQ2d 1974, 1976 (TTAB 1994). Applicant therefore respectfully requests that the Examiner withdraw the Section 2(d) refusal of Applicant?s application and allow the application to proceed through registration.

GOODS AND/OR SERVICES SECTION (009)(current)

INTERNATIONAL CLASS	009

DESCRIPTION

downloadable software in the nature of a mobile application that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content,excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics

FILING BASIS	Section 1(b)

GOODS AND/OR SERVICES SECTION (009)(proposed)

INTERNATIONAL CLASS	009

TRACKED TEXT DESCRIPTION

~~downloadable software in the nature of a mobile application that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content,excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics~~; downloadable software in the nature of a mobile application not for general business purposes that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover

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FINAL DESCRIPTION	
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FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (035)(class deleted)	
SIGNATURE SECTION	
RESPONSE SIGNATURE	/smh/
SIGNATORY'S NAME	Scott Hervey
SIGNATORY'S POSITION	Attorney of record, California bar member
SIGNATORY'S PHONE NUMBER	3108603304
DATE SIGNED	09/27/2016
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Sep 27 15:51:35 EDT 2016
TEAS STAMP	USPTO/RFR-XXX.XX.X.XX-201 60927155135018047-8589235 4-550b76957dec5f9c3ed5155 6acabc18f7de9f7b62c668bda 16fcc1ac4e4dfd46e-N/A-N/A -20160927152816263019

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **85892354** DISTINCT(Standard Characters, see http://tmng-al.uspto.gov/resting2/api/img/85892354/large) has been amended as follows:

ARGUMENT(S)
In response to the substantive refusal(s), please note the following:

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Robertson, 269 U.S. 372 (1926)). Moreover, the question of likelihood of consumer confusion is one of fact. See In re E.I. DuPont de Nemours and Co., 476 F.2d 1357, 1361, 177 USPQ 563 (C.C.P.A. 1973). Therefore, each case must be decided on its own facts, and there can be ?no litmus rule which can provide a ready guide to all cases.? Id. at 1361. In testing for likelihood of confusion under Section 2(d), the DuPont court set forth thirteen factors to be considered. Id. at 1361. However, pursuant to TMEP ? 1207.01, only the first two factors are to be considered unless relevant evidence with respect to the remaining factors is contained in the record. 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Stanley Works, (2d Cir. 1995) 59 F.3d 384, (knowledgeable buyer of defendant?s $400 pneumatic stapler gun used for building construction and furniture manufacture is sophisticated and not likely to be confused by defendant?s model number); CMM Cable Rep. v. Ocean Coast Props., Inc., (D. Me. 1995) 888 F.Supp. 192, (sophisticated professional buyers ?are less likely to be confused as to the source or origin of a product than ordinary consumers of inexpensive foods or services.?).) This is the case even where identical marks are associated with related goods. (Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., (1st Cir. 1983) 220 USPQ 786 (ASTRA for anesthetic preparations and for computerized blood analyzers)). Here Distinct Corp?s goods are used for software developers and network administrators. These are professional purchasers who will engage in selection process more discerning than an ordinary purchaser. 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Inc., 209 USPQ 791 (TTAB 1981); and In re Grand Metropolitan Foodservice Inc., 30 USPQ2d 1974, 1976 (TTAB 1994). Applicant therefore respectfully requests that the Examiner withdraw the Section 2(d) refusal of Applicant?s application and allow the application to proceed through registration.

CLASSIFICATION AND LISTING OF GOODS/SERVICES
Applicant hereby deletes the following class of goods/services from the application.
Class 035 for advertising agencies; brand product design and brand development services for corporate and individual clients; Media production services, namely, video and film production; production of television programs production of television programs and television commercials

Applicant proposes to amend the following class of goods/services in the application:
Current: Class 009 for downloadable software in the nature of a mobile application that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content, excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics
Original Filing Basis:
Filing Basis: Section 1(b), Intent to Use: ***For a trademark or service mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. ***For a collective trademark, collective service mark, or collective membership mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. ***For a certification mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

Proposed:
Tracked Text Description: ~~downloadable software in the nature of a mobile application that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content,excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics~~; downloadable software in the nature of a mobile application not for general business purposes that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content,excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics

Class 009 for downloadable software in the nature of a mobile application not for general business purposes that allows users to interact online with information and media content that other users share, and software that allows users to create, upload, view, discover share data, information and media content,excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics
Filing Basis: Section 1(b), Intent to Use: ***For a trademark or service mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. ***For a collective trademark, collective service mark, or collective membership mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. ***For a certification mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

SIGNATURE(S)
Request for Reconsideration Signature
Signature: /smh/ Date: 09/27/2016
Signatory's Name: Scott Hervey
Signatory's Position: Attorney of record, California bar member

Signatory's Phone Number: 3108603304

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior

representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85892354
Internet Transmission Date: Tue Sep 27 15:51:35 EDT 2016
TEAS Stamp: USPTO/RFR-XXX.XX.X.XX-201609271551350180
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